TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~455,~~ 223 43

THE UNITED STATES, APPELLANTS,

vs.

THOMAS CLYDE, (FILED MAY 17, 1870,)

AND

No. ~~456,~~ 224 44

THOMAS CLYDE, APPELLANT,

vs.

THE UNITED STATES, (FILED MAY 19, 1870.)

APPEALS FROM THE COURT OF CLAIMS.

SUPREME COURT OF THE UNITED STATES.

No. 455,

THE UNITED STATES, APPELLANTS,

VS.

THOMAS CLYDE,

AND

No. 456,

THOMAS CLYDE, APPELLANT,

VS.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

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1 *Petition.—Filed* 23 *Oct.*, 1868.

United States Court of Claims.—December term, 1868.

THOMAS CLYDE
vs.
THE UNITED STATES.

To the honorable the judges of the Court of Claims:

Your petitioner, Thomas Clyde, a citizen of the United States, and a resident of the city of Philadelphia, Pennsylvania, respectfully represents that he was on the 16th day of November, A. D. 1862, the sole owner of the steam ferry-boat Tallacca, then lying in the harbor of Alexandria, Virginia; that, on the day last named, the United States, through their proper officer, C. B. Ferguson, captain and assistant quartermaster U. S. A., chartered said vessel from your petitioner for purposes set forth in a regularly-executed charter-party, a copy whereof is hereunto annexed, marked "A," and made part hereof; that, by the terms of said charter-party, the United States agreed to pay, or cause to be paid, to your petitioner, the full and just sum of $115 per day for each and every day said vessel might be employed.

Your petitioner further avers that, agreeably to the terms of said contract or charter-party, said vessel entered upon the service of the United States on the 16th day of November aforesaid, and so continued in said service, faithfully and at all times discharging all the obligations of said charter-party, until the 31st day of July, A. D. 1863, when said vessel was finally discharged from said service, and said charter-party ended; and your petitioner further says that the whole number of days' service rendered under said charter-party by said vessel was two hundred and fifty-seven, for which the United States agreed
2 to pay the sum of $115 per day, amounting in the total to the sum of $29,555; but your petitioner says that the United States, in paying your petitioner for said services, arbitrarily, and to the great wrong and injury of your petitioner, and against his earnest protest, refused to pay your petitioner more than $75 per day for said services. And he avers further that although he has frequently demanded payment of the balance due petitioner, they, the United States, have refused to pay said balance; whereby and wherefore there is now due and owing petitioner from the United States the sum of $9,880. Your petitioner further avers that the services of said vessel were well and reasonably worth the full amount agreed to be paid under said charter-party; wherefore, and by reason of the express stipulation of said charter-party, he asks judgment against the United States for the balance herein shown to be due, viz., the sum of $9,880.

Second count. And for other and further cause of action, your petitioner alleges that on the 28th day of February, A. D. 1862, he was the sole owner of the barge W'm E. Hunt, of the burthen of two hundred and seventy-five tons, then being and lying in the port of Philadelphia, Pennsylvania; that on the day last named, the United States entered into a written charter-party, by their proper officer and agent, Captain H. C. Hodges, assistant quartermaster U. S. A., with your petitioner, for the service of said barge W'm E. Hunt, a copy of which charter-party is hereunto attached and made part hereof, marked "B;" that, agreeably to the terms of said charter, your petitioner did, on the day last named, enter upon duty with said barge W'm E. Hunt, and so

continued until about the 20th day of January, A. D. 1863, when, without fault or neglect of your petitioner, the said barge was captured and burned by the rebel enemies of the United States, then at war with the said United States, and became a total loss to your petitioner, to the damage of your petitioner in about the sum of $5,000. Your petitioner further avers that, by the express terms of said charter-party, the United States assumed the war risk, and thereby became liable for said loss and damage to your petitioner. He therefore asks judgment against the United States for the sum of $5,000.

Your petitioner further avers that he has at all times borne true allegiance to the government of the United States, and that he has not in any way given aid and comfort to the rebellion voluntarily.

Your petitioner avers that application has been made for pay-
3 ment of said claims above set forth to the proper department, but without success. He therefore asks judgment for the amounts herein claimed, viz., the sum of $14,880.

CHIPMAN, HOSMER & CO.,
Attorneys for Petitioner.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Thomas Clyde, being duly sworn, on oath says that he is the petitioner in the foregoing claims; that no assignment or transfer of said claims, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said petitioner is entitled to the amount in said petition claimed, after allowing all just credits and offsetts; and that he believes the facts as stated in said petition are true.

THOMAS CLYDE.

Subscribed and sworn to before me this 14th day of October, A. D. 1868, a notary public for the Commonwealth of Pennsylvania, residing in the city of Philadelphia.

A. M. MORTON,
Notary Public.

Exhibit A.

This charter-party of affreightment, made and concluded on this sixteenth day of November, in the year one thousand eight hundred and sixty-two, between Thomas Clyde, owner of ferry-boat Tallacca, of the burthen of tons, or thereabouts, at present lying in the harbor of Alexandria, and commanded by Bright, of the first part, and Captain C. B. Ferguson, assistant quartermaster United States Army, of the second part, witnesseth that the said party of the first part does and doth hereby grant and to freight let, and the said Captain C. B. Ferguson, assistant quartermaster United States Army, does and doth hereby grant and to freight take, the said vessel, to load at Alexandria, or elsewhere, and proceed on the voyage as hereinafter mentioned, (always reserving sufficient room for the stowage of the vessel's cables and materials, and accommodation of the officers and crew.)

And thereupon the party of the first part, and his heirs, execu-
4 tors, administrators, and assigns, doth hereby covenant, grant, and agree to and with the said Captain C. B. Ferguson, assistant quartermaster United States Army, that the said vessel now is, and shall be kept and maintained during the whole of the voyage mentioned in this contract, tight, staunch, strong, and well and sufficiently manned, victualled, tackled, apparelled, and ballasted, and

furnished in every respect fit for merchant's service at the cost and charges of her owners, and shall, on the sixteenth day of November, one thousand eight hundred and sixty-two, be ready to receive on board, whenever then tendered alongside by the quartermaster United States Army, their factors or assigns, such goods as they shall order and direct and the said vessel can conveniently stow and carry; and, when laden, shall sail with the first good opportunity from the port of Alexandria or elsewhere, and proceed direct to such ports and places as ordered by the quartermaster United States Army, and deliver cargo to the quartermaster or duly authorized agent of the Quartermaster's Department. All port charges will be paid by the War Department after leaving the port of Alexandria; all cargo to be received and delivered within reach of said vessel's tackles, and shall deliver her cargo in good order and condition, (the dangers of the seas and navigation, and the restraints of princes and rulers being always excepted.) The war risk will be borne by the United States; the marine risk, by the owners.

In consideration whereof the said Captain C. B. Ferguson, assistant quartermaster United States Army, does agree to employ the said vessel, and furnish fuel on the voyage or voyages aforesaid; and that, as a freight or hire of the said vessel, during the term of said contract, he will pay, or cause to be paid, the full and just sum of $115 per day, for each and every day said vessel may be employed, until the said vessel so returned to the said party of the first part, at Alexandria, in the same order as when received, common wear and tear excepted, to become due, owing, and payable in the manner and form following, that is to say, payable to the order of Tho's Clyde, at the quartermaster's office of the United States, at Alexandria, upon presenting certificates of the duly authorized agent of Quartermaster's Department that said vessel has faithfully performed her part of this contract; this contract to continue in force for the full term of ten days from the above date, and as much longer as said vessel may be required by the United States War Department.

No member of Congress shall be admitted to any share or part in this contract, or to any benefit to arise therefrom.

In witness whereof the said parties to these presents have hereunto interchangeably set their hands and affixed their seals, on the 16th day of November, 1862.

THOMAS CLYDE. [L. S.]
C. B. FERGUSON, [L. S.]
Captain and A. Q. M. U. S. A.

Signed, sealed, and delivered in the presence of us:
T. R. CHANEY,
H. W. SNOW.

Exhibit B.

This charter-party of affreightment, made and concluded on this twenty-sixth day of February, in the year one thousand eight hundred and sixty-two, between Thomas Clyde, owner of the barge or vessel called the W'm E. Hunt, of Philadelphia, of the burthen of two hundred and sixty-five tons, or thereabouts, at present lying in the harbor of Philadelphia, and commanded by P. McDermott, of the first part, and Captain H. C. Hodges, assistant quartermaster United States Army, of the second part, witnesseth that the said party of the first part does and doth hereby grant and to freight let, and the said Captain H. C. Hodges, assistant quartermaster United States Army, does and doth

hereby grant and to freight take, the said vessel, to load at Philadelphia, or elsewhere, and proceed on the voyage, as hereinafter mentioned, (always reserving sufficient room for the stowage of the vessel's cables and materials, and accommodation of the officers and crew.) And thereupon the party of the first part, and his heirs, executors, administrators, and assigns, doth hereby covenant, grant, and agree to and with the said Captain H. C. Hodges, assistant quartermaster United States Army, that the said vessel now is, and shall be kept and maintained during the whole of the voyage mentioned in this contract, tight staunch, strong, and well and sufficiently manned, victualled, tackled, apparelled, and ballasted, and furnished in every respect fit for merchant's service at the cost and charges of her owners; and shall, on the twenty-sixth day of February, one thousand eight hundred and sixty-two, be ready to receive on board, whenever then tendered alongside by the quartermaster United States Army, their factors or assigns, such goods as they shall order and direct, and the said vessel can conveniently stow and carry; and, when laden, shall sail with the first
6 good opportunity from the port of Philadelphia, or elsewhere, and proceed direct to such ports and places as ordered by the quartermaster United States Army, and deliver cargo to the quartermaster or duly authorized agent of the Quartermaster's Department. All port charges will be paid by the War Department after leaving the port of Philadelphia; all cargo to be received and delivered within reach of said vessel's tackles, and shall deliver her cargo in good order and condition, (the dangers of the seas and navigation, and the restraints of princes and rulers being always excepted.) The war risk will be borne by the United States; the marine risk, by the owners until under orders south of Cape Henry, (the southern cape of Chesapeake Bay,) after which the marine risk will be borne by the United States until they reach that latitude on their return.

In consideration whereof the said Captain H. C. Hodges, assistant quartermaster United States Army, does agree to employ the said vessel on the voyage or voyages aforesaid, and that, as a freight or hire of the said vessel during the term of this contract, he will pay, or cause to be paid, the full and just sum of $31 per day, for each and every day said vessel may be employed, and to furnish all fuel from the above date until the said vessel is returned to the said party of the first part, at Philadelphia, in the same order as when received, common wear and tear excepted, to become due, owing, and payable in the manner and form following, that is to say, payable to the order of Thomas Clyde, at the quartermaster's office of the United States at Philadelphia, upon presenting certificates of the duly authorized agent of the Quartermaster's Department that said vessel has faithfully performed her part of this contract; this contract to continue in force for the full term of one month from the above date, and as much longer as said vessel may be required by the United States War Department.

No member of Congress shall be admitted to any share or part in this contract, or to any benefit to arise therefrom.

In witness whereof the said parties to these presents have hereunto interchangeably set their hands and affixed their seals on the day March, one thousand eight hundred and sixty-two.

THO'S CLYDE. [L. S.]
HENRY C. HODGES. [L. S.]
Captain and A. Q. M. U. S. A.

Signed, sealed, and delivered in the presence of us:
JOHN TUCKER, Jr.
JACOB CUMMINGS.

7 In the United States Court of Claims.—December term, A. D. 1868.

THO'S CLYDE
vs.
THE UNITED STATES. } No. 3650.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of fourteen thousand eight hundred and eighty dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

Filed January 11, 1869.

8 *Amended petition.—Filed 30 April, 1869.*

United States Court of Claims.—December term, A. D. 1868.

THOMAS CLYDE
vs.
THE UNITED STATES. } No. 3650.

Your petitioner, Tho's Clyde, avers that the amount due him from the United States for the service of the steamer Tallacca, under charter of the United States, as set forth in the first count of the original petition in the foregoing cause, is improperly stated in the original petition as nine thousand eight hundred and eighty-eight dollars; whereas the sum due your petitioner was and is ten thousand dollars; and your petitioner asks that his original petition be amended to conform to the fact.

Your petitioner, therefore, by reason of the premises, asks judgment for the sum of fifteen thousand dollars.

THO'S CLYDE,
Petitioner.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Personally came before me, a notary public in and for said county and State, Thomas Clyde, who, being duly sworn, says that he is
9 the petitioner in the foregoing petition; that no assignment of the claim therein stated has been made except as in said petition stated; that the amount claimed is due to the petitioner after allowing all just offsets and credits; and that the matters and things in said petition stated are true.

THO'S CLYDE.

Subscribed and sworn to before me this 29th day of April, A. D. 1869.
E. H. BAILEY,
Notary Public.

10 In the Court of Claims.

THOMAS CLYDE
vs.
THE UNITED STATES. } No. 3650.

And now, to wit, December 6th, 1869, the court, upon due consideration of the premises, do find in favor of the claimant on the first cause of action stated in his petition, and do order, adjudge, and decree that the said Thomas Clyde do have and recover of & from the United States the sum of seven thousand six hundred and forty dollars, ($7,640 00.)
By the court.

And on the second cause of action stated in said petition, the court finds in favor of the defendants, and do order, adjudge, and decree that, on the said second cause of action, said petition be dismissed without prejudice.
By the court.

11 In the United States Court of Claims.

THO'S CLYDE
vs.
THE UNITED STATES. } 3650.

From so much of the judgment as decrees a recovery against the United States of seven thousand six hundred & forty dollars in the above entitled cause on the 6th day of December, 1869, in favor of the claimants, the defendants, by their Attorney General, on this 2d day of March, 1870, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS H. TALBOT,
Ass't Att'y General.

Filed in clerk's office, M'ch 2, 1870.

Ordered, that the appeal prayed by the defendants be allowed.
By the court.
March 2d, 1870.

12 In the United States Court of Claims.

THO'S CLYDE
vs.
THE UNITED STATES. } 3650.

The petitioner in the above-entitled cause appeals from so much of the judgment of the court as refused the petitioner pay for the services of his vessel at the charter rates after May 31, 1863.
And the petitioner also appeals from the judgment of the court dismissing the cause of action presented in the second count of claimant's petition.
And the petitioner moves the court for an allowance of an appeal to

the Supreme Court of the United States this 2d March, 1870, and of this motion notice is hereby given the United States.

CHIPMAN & HOSMER,
Att'ys for Petitioner.

Filed in clerk's office March 2d, 1870.

Ordered, that the appeal prayed by the claimant be allowed.
By the court.
M'ch 2d, 1870.

13 *Findings of fact and conclusions of law of the Court of Claims.*

THOMAS CLYDE
vs.
THE UNITED STATES. } 3650.

This cause coming on to be heard at the December term, 1870, of the Court of Claims, the court, upon the evidence, makes and determines the following findings of fact and conclusions of law:

I. On November 16th, 1862, and during the emergency caused by the removal of the army of the Potomac to Falmouth, the "Tallacca," a steam-vessel owned by the claimant, was chartered by Captain C. B. Ferguson, an officer in the Quartermaster's Department, acting at Alexandria, Virginia, under the instructions of General Rucker, the chief quarter-
14 master at Washington. The charter-party set forth and declared upon in the petition was formally executed, and was immediately transmitted to the Quartermaster General by Captain Ferguson; the agreed compensation of $115 a day, which the court also finds was the reasonable value of her services.

II. The boat continued in the service of the government, and performed all the stipulations of her charter, until July 31st, 1863. She was paid at the agreed rate up to the last of February, 1863, without objection or question being raised on either side. But on May 13th the Quartermaster General disapproved of the charter-party of the "Tallacca" by the following order:

"The charter of the 'Tallacca' is disapproved by the Quartermaster General. She will be paid for only at the rate of seventy-five dollars ($75 00) per day, from the date of her charter, Nov. 16th, 1862, so
15 long as she may be retained in the service. The excess of forty dollars per day already paid in former settlements, from November 16th, 1862, to February 28th, 1863, will be deducted on the present settlement for her services from March 1st, 1863, to April 30th, 1863, less six days, from March 31st to April 6th, 1863, lost in making repairs."

The claimant was notified of the contents of this order soon after its receipt by Captain Ferguson, and during the month of May, 1863. He refused to consent to the reduction, and offered to file a paper to that purport, or to receive money under a written protest. But the claimant has failed to show whether, on being notified of this order, he determined to allow his boat to remain in the service at the reduced rate, or sought to take her out of it, and terminate her employment by the government. The boat, in fact, remained in the service until
16 July 31st, 1863, with or without his consent.

III. No payment was made for the services of the vessel until the 1st of December, 1863, when the defendants' quartermaster stated an account, which was paid and receipted for as follows:

"*The United States to Thomas Clyde,*

"1863. DR.

"July 31st.	For services of the steamer "Tallacca," employed transporting troops and supplies, from March 1st, to July 31st, 1863, inc., 153 days, at $75 per day	$11,475 00
	"Deducting for six days lost in making repairs, as per report Col. D. H. Rucker, from March 31st to April 6th, 1863	450 00
		11,025 00
	"Deduct for two days lost in June, 1863	150 00
		10,875 00
17	"Deducting excess of $40 per day already paid in former settlements, from November 16th, 1862, her date of charter, to February 28th, 1863, as per letter of instructions dated Q. M. G. Office, May 13th, 1863	4,200 00
		$6,675 00

"I certify that the above account is correct; that the services were rendered as stated; and that they were necessary for the public service.

(Signed) "C. B. FERGUSON,
"*Capt., A. Q. M. U. S. A.*

"Received, at Alexandria, V'a, the 1st day of December, 1863, of Capt. C. B. Ferguson, assistant quartermaster United States Army, the sum of six thousand six hundred and seventy-five dollars, in full of the above account.

(Signed in triplicate.)

(Signed) "THOM. CLYDE."

And upon these facts the Court of Claims, as its conclusions of law, decides—

18 I. That the Quartermaster General had no arbitrary power to reduce the rate of compensation fixed by the charter-party as to the period already passed, when the reduction was ordered; and that the claimant should recover at the charter rate until knowledge of the Quartermaster General's reduction was brought home to him by the defendants, to wit, until the 31st of May, 1863.

II. That on the defendants bringing knowledge of the Quartermaster General's order home to the claimant, the burden of proof rests on him to show that he sought to take the vessel out of the service; and he, failing to make such proof, the presumption of law is that he voluntarily left her in the service, subject to the future restrictions of the order, and that he should not recover for the period subsequent to the 31st May, when he received notice.

19 And the Court of Claims further finds, as matter of fact, under the second count of the claimant's petition—

I. The claim or cause of action therein set forth was never presented for payment to any executive department of the government.

II. The rules of practice of the Court of Claims provide that "the petition must set forth a full statement of the claim, and of the action

thereon in Congress, or by any of the departments, if such action has been had, specifying also what person or persons are owners thereof or interested therein, and when and upon what consideration such person or persons became so interested. In every case where the claim is such as is ordinarily settled in any executive department, the petition shall show that application for its allowance has been made to that de-
20 partment, and without success, and its decision thereon."

And upon these facts the court, as a conclusion of law, decides—

I. That the Court of Claims has jurisdiction of a claim arising upon express contract for the charter of a vessel in the military service of the defendants, notwithstanding that it has never been presented to any executive department for payment, and has never been allowed or rejected by the accounting officers of the government.

II. That under the rules of practice which the Court of Claims is by law authorized to adopt, and in contemplation of the statutes relative to the court, the defendants are entitled to have every claim which may be settled and paid by an executive department referred to such department for adjustment before being brought to trial in the Court of Claims, and that the defendants, having taken such objection
21 here, the petition should be dismissed.

22 In the Court of Claims.

THOMAS CLYDE
vs.
THE UNITED STATES. } No. 3650.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the applications of the Att'y General for defendants, and of counsel for claimant, for the allowance of an appeal, as filed in the clerk's office March 2d, 1870, and of the order of the Court of Claims allowing the same; of the findings of fact, and the conclusions of law thereon, on which the said court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this seventeenth day of May, A. D. 1870.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 455, the United States, appellants, vs. Thomas Clyde, filed 17th May, 1870; and No. 456, Thomas Clyde, appellant, vs. the United States, filed 19th May, 1870. Court of Claims.

RECS. 455 & 456—2

Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, APPELLANTS,

vs.

THOMAS CLYDE.

No. 223.

THOMAS CLYDE, APPELLANT.

vs.

THE UNITED STATES.

No. 224.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF C UNSEL OF THOMAS CLYDE.

N. P. CHIPMAN,
CHARLES F. PECK,
THOMAS J. DURANT,
Counsel for Appellees.

Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, Appellants,
vs.
THOMAS CLYDE. } No. 223.

THOMAS CLYDE, Appellant,
vs.
THE UNITED STATES. } No. 224.

Brief of Counsel of Thomas Clyde.

This is an action commenced in the Court of Claims, Sec. 5 Nott & Huntington, p. 134, where Clyde claimed $9,880, a balance alleged to be due him on a contract of charter-party, for the hire of the steamboat Tallacca; he claimed further the sum of $5,000 damages for the loss of the barge W. E. Hunt, destroyed by the rebel enemies of the United States, while in the latter's service, under a similar contract. See Pet., Rec., p. 1, 2.

By an amended petition, filed April 3, 1869, the claim for the Tallacca was increased to ten thousand dollars. See Rec., p. 5.

The Court of Claims gave judgment for the first claim, the Tallacca, in the sum of $7,640, from which the United States have appealed. See Rec., p. 6.

And the court gave judgment on the second claim, "The Hunt," dismissing the same. See Rec., p. 6.

The petitioner appealed from both of these judgments. Rec., pp. 6, 7.

The Facts.

The Quartermaster Department chartered the Tallacca from the petitioner on the 16th of November, 1862, by a contract in writing and under seal, to load at Alexandria, Va., to proceed to such ports and places as ordered by the Quartermaster of the United States; the price agreed upon was $115 a day; the contract to continue in force ten days, and as much longer as the vessel might be required by the War Department. See Rec., pp. 2 and 3.

The price of $115 a day was not only agreed upon in the contract, but was proved to be a reasonabl price. Rec., p. 7., lines 23 to 25.

The Tallacca was retained in the service of the War Department until the 31st of July, 1863. Rec., p. 7, lines 26 and 27.

Her owner was paid, according to contract, up to the last of February, 1863. Rec., p. 7, lines 27 to 29.

On the 13th of May, 1863, the Quartermaster General ordered that the Tallacca should be paid at the rate of $75 a day instead of $115, the contract rate, and that the reduction should affect her service prior to that date, and even the days for which she had been paid, so as to make a contract for the owner at the lower rate from the commencement of the hiring, November 16, 1862. The excess of $40 a day on past payment to be deducted from the amount then about to be paid under the new rate. Rec., p. 7, lines 32 to 39.

This order of reduction was soon after made known to the petitioner, who refused to consent to it, and offered to put his refusal in writing, or to receive the money under protest. Rec., p. 7, lines 40 to 42.

Although the Tallacca was retained by the War Department up to July 31, 1863, inclusive, no payment was made until the 1st of December following. Rec., p. 7, lines 49 to 51.

The account was stated by the Government, not by the petitioner, and may be seen on page 8 of the record; it finds a sum due the petitioner of $6,675; a result reached by crediting him with 153 days service at $75, (instead of $115,) by deducting four days alleged to have been lost in making repairs, and two days lost in some mode not named, and lastly by deducting $40 a day on former payments; the result of $6,675 was paid petitioner on 1st of December, 1863.

ERRORS ON THE FOREGOING PORTION OF THE CASE.

First. The court below erred in not awarding to petitioner his full pay according to contract for the whole term of the service of the Tallacca.

The whole time of service from 16th of November, 1862, until July 31, 1863, was 258 days, which at $115 a day would entitle petitioner to	$29,670
He had received up to February 28, 1863	11,500
Leaving due him	$18,170
Of this he received	6,675
Leaving due him	$11,495

The court below allowed him only $7,640. See Rec., p. 6, being $3,855 less than he is entitled to.

The court below has well said "that the Quartermaster General had no power to reduce the rate of compensation fixed by the charter party," and this is so plain a question that we will not attempt to make it clearer by argument, or to support it by authority.

It is just as plain, however, that the court below erred, in saying that the Quartermaster had a right to reduce the pay after the date of his notice to petitioner of his design to do so.

The price being an essential element of the contract, could only be changed by the consent of both parties,

and so far from yielding his assent, the petitioner so soon as the desire of the Quartermaster to reduce the pay was made known to him, promptly "refused to consent to the reduction." See Rec., p. 7, lines 41 and 42.

Upon this proposal on the one side to make a new contract and on the other a refusal to enter into such a one, what were the respective duties of the parties? About this, it is not possible there should be any difference of opinion.

The quartermaster proposes; the petitioner rejects; therefore there is no new contract.

The court below says that the petitioner assented to the proposal—though he had positively refused to do so—because "he has failed to show whether, on being notified of this order, he determined to allow his boat to remain in the service at the reduced rate, or sought to take her out of it, and terminate her employment by the Government." See Record, p. 7, lines 43 to 47.

It was not incumbent on the petitioner to make such a showing, or to do anything of the kind.

The charter party expressly declares that "this contract is to remain in force for the full term of ten days from the above date, and as much longer as said vessel may be required by the United States War Department."

When, therefore, the petitioner rejected the proposal to reduce the rate of pay, it was the duty of the quartermaster, if he did not wish to retain the Tallacca at the contract price, to give her up at once to the owner.

The court will remark that from the time when the desire of the quartermaster to reduce the price was communicated to the petitioner, May 16, 1863, record, p. 7, lines 40 and 41, until the Tallacca was discharged from the service of the United States, there was no payment made to the petitioner, so that there can be no question of acquiescence in the proposed reduction, based on the acceptance of a reduced rate.

Second Count of the Petition.

Five thousand dollars were claimed by the petitioner as the value of the barge Hunt, destroyed by the rebels while she was in the service of the United States.

The Facts.

The barge was chartered by the United States by a contract in writing and under seal—see charter party, record, pp. 3 and 4, in which the war risk was assumed by the United States. See Record, p. 4, lines 26 and 37.

This claim was not presented to the executive department of the Government before bringing suit in the Court of Claims.

A rule of practice of the Court of Claims required, that "in every case where the claim is such as is ordinarily settled in any executive department, the petition shall show that application for its allowance has been made by that department, and without success, and its decision thereon."

Error in this Part of the Case.

First. The court below erred in dismissing this claim for the loss of the barge, for the reason that it had not been presented and decided in one of the departments.

The act of February 24, 1855, to establish a court for the investigation of claims against the United States, section 1, 10th Stat. at Large, p. 612, declares that "the said court shall hear and determine" all claims founded "upon any contract, express or implied, with the Government of the United States."

The second section of the act of March 3, 1863, amendatory of the former, 12th Stat. at Large, p. 675, uses the same language.

This enactment gives to every man having a claim founded on contract, the right to bring his suit unconditionally, and the court below has consequently well

said, that "the Court of Claims has jurisdiction of a claim arising upon express contract for the charter of a vessel in the military service of the United States, notwithstanding that it has never been presented to any executive department for payment, and has never been allowed or rejected by the accounting officers of the Government."

The lower court then, had by the statute, jurisdiction of this claim; why then did they refuse to entertain it? On account of their rule which imposed a condition not found in the statute. The suitor whom the law admits the rule excludes. Which is to prevail? Can a court, by the adoption of a rule, restrict or enlarge its own jurisdiction? Certainly neither the one nor the other. This is elementary and can scarcely need the citation of authorities; we refer, however, to—

Wallace *vs.* Cook, 3 Woodb. and Min., p. 363, top.

The Steamer St. Lawrence, 1st Black, p. 526.

The allegation of the petition with regard to these claims, both that of the first and that of the second count, is "that application has been made for payment of said claim above set forth, to the proper department, but without success." See Rec. p. 2, lines 13 to 15.

The court below does not find as a fact that the Tallacca claim was presented to a department, and finds as a fact that the claim for the Hunt claim was not presented; if proof of presentation be necessary, it should be required as much in one case as the other, yet the court below gave judgment in favor of the petitioner on the Tallacca count, without any such proof.

In Baker's case which was the same as that of the Hunt, a claim for the value of a vessel destroyed by the rebels while in the United States service, no such fact as presentment for settlement at the department is found by the court, and yet there was a judgment for the claimant. See 3d N. & H., Court of Claims, Reports p. 82.

It must be further observed that the 10th section of the

act of March 3, 1863, (12th statutes at large p. 765), claims must be presented to the court in six years from the time they accrue or be barred forever. Whereas it may often, and does happen, that if a claim had to be made at the department, and an adjudication had there, before the claimant could be entitled to sue in the Court of Claims, he would find himself destroyed by the delay he experienced is qualifying himself to sue.

Pursuing this subject we call attention again to the act of Congress organizing the court, where in the first section it is stated: "It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, *if such action has been had.*" This language is inconsistent with the theory that a claim must be first presented to a department before suit can be brought in the court, for it is purely conditional, not absolute.

Second. The supposed special jurisdiction of the Third Auditor in such a case as the present, has been changed by legislation.

The act supposed to give the special jurisdiction is that of March 3, 1849, (IX statute at large, p. 414), but the jurisdiction thereon vested in the Third Auditor was charged by the eighth section of the act of July 28, 1866, XIV stat. at large, p. 327, which deprives the Third Auditor of any special or exclusive jurisdiction in this class of cases, and makes him a mere auditing officer as in other cases.

Though it is important to be borne in mind that our action here is not based upon the acts of Congress referred to, which render the Government liable for the destruction of a vessel by an enemy and otherwise while in the public service, but as stated in the petition, we rely upon our express contract that the United States would assume the war risk. The acts of Congress quoted apply only to

cases of impressment or to cases in which the contract is silent on the point.

Third. The rule of the Court of Claims relied on has been superseded by a later statute securing in another method the object sought to be obtained by the rule.

The rule referred to says, "in every case where the claim is such as is ordinarily settled in any executive deparment, the petition shall show that application for its allowances has been made to that department and without success, and its decision thereon."

The object of the rule was to secure to the court information from the departments, which might not otherwise be attainable, but it has been rendered useless by the operation of the sixth section of the act of June 25, 1868, XV Stat. at L., p. 76, which makes it the duty of the Attorney General in every case where a petition is filed in the court "upon any contract, agreement, or transaction with any executive department, or any bureau, officer or agent of such department, &c., to trasmit to said department, bureau or officer as aforesaid, a printed copy of the petition with a request to furnish all the facts, evidence and circumstances touching said claim as may be in their possession or knowledge; the act then makes it the duty of the department to furnish all such information, and if the claim has been passed upon to furnish a statement of the decision and the reasons in support of it.

The rule in fact had sunk into oblivion, although up to the time the Attorney General made the objection in the court below, it had not been formally repealed, yet it was abolished immediately after the point had been made.

Respectfully submitted.

N. P. CHIPMAN,
CHARLES F. PECK,
THOMAS J. DURANT,
for THOMAS CLYDE.

OCTOBER 11, 1871.

In the Supreme Court of the United States.

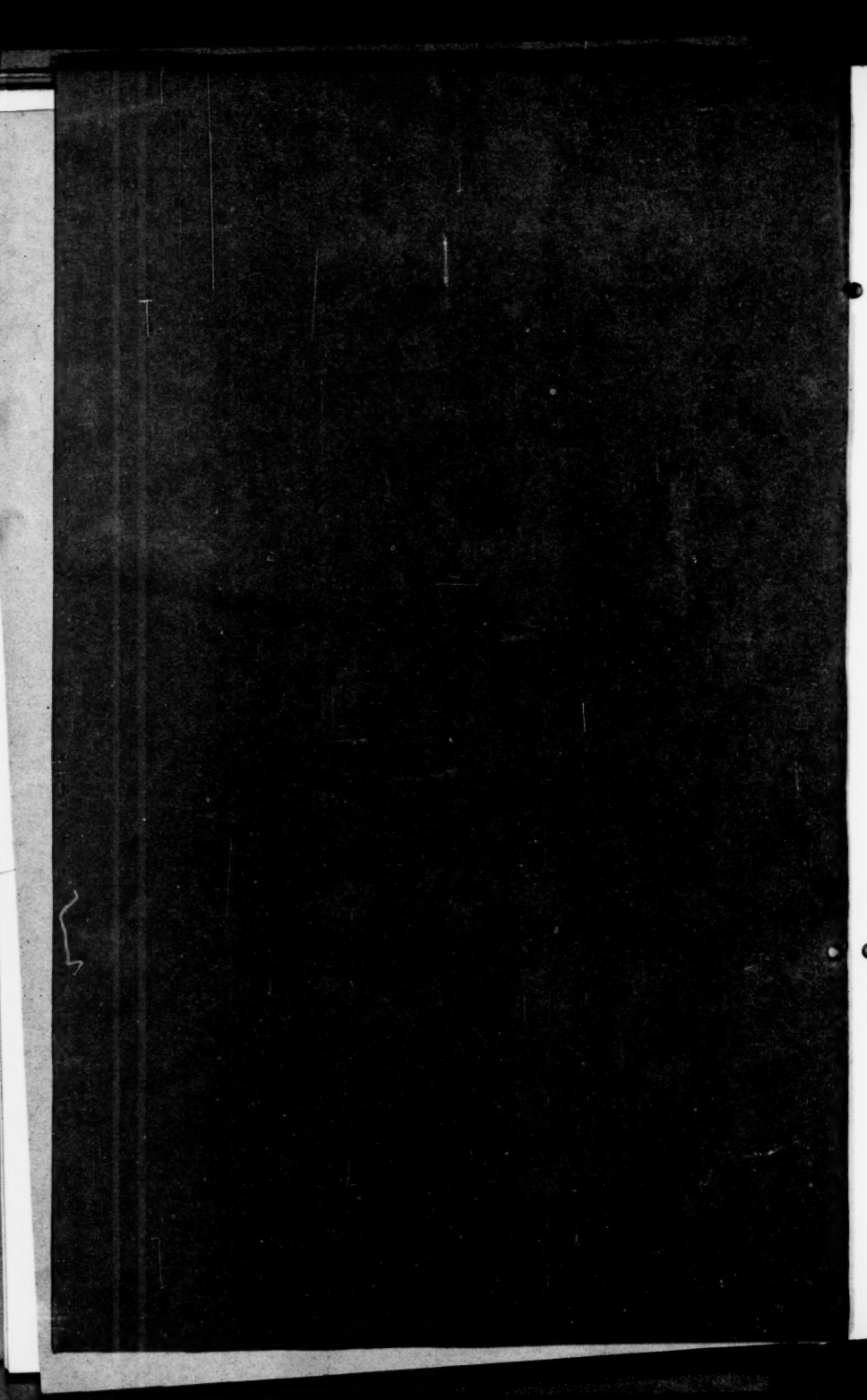
DECEMBER TERM, 1870.

THE UNITED STATES, *Appellants*,
vs.
THOMAS CLYDE. } No. 223.

THOMAS CLYDE, *Appellant*,
vs.
THE UNITED STATES. } No. 224.

Appeal from the Court of Claims.

BRIEF FOR THE THE UNITED STATES.



In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, *Appellants*, *vs.* THOMAS CLYDE. } No. 223.

THOMAS CLYDE, *Appellant*, *vs.* THE UNITED STATES. } No. 224.

Appeal from the Cour of Claims.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The claimant petitioned the Court of Claims for compensation for the use of the steam ferry-boat "Tallacca," by the Government, and also of the barge "William E. Hunt," both under charter-parties with assistant quartermasters of the United States Army. The charter-party of the "Tellacca" was executed between the claimant and Captain Ferguson, assistant quartermaster, on the 16th day of November, 1862, and thereby the vessel was chartered for ten days, and "as much longer as said vessel may be required by the United States War Department," and the Government was to pay $115 a day for the service of the vessel. The vessel

continued in the service of the Government, and performed all the stipulations of the charter until July 31, 1863. She was paid at the agreed rate up to the last of February, 1863, without objection or question being raised on either side. But on May 13 the Quartermaster General disapproved of the charter-party by the following order: "The charter of the 'Tallacca' is disapproved by the Quartermaster General. She will be paid for only at the rate of seventy-five dollars per day from the date of her charter, November 16, 1862, so long as she may be retained in the service. The excess of forty dollars per day, already paid in former settlements, from November 16, 1862, to February 28, 1863, will be deducted on the present settlement for her services, from March 1, 1863, to April 30, 1863, less six days, from March 31 to April 6, 1863, lost in making repairs."

The court finds, that "the claimant was notified of the contents of this order, soon after its receipt, by Captain Ferguson, and during the month of May, 1863. He refused to consent to the reduction, and offered to file a paper to that purport, or to receive money under a written protest. But the claimant has failed to show whether, on being notified of this order, he determined to allow his boat to remain in the service at the reduced rate, or sought to take her out of it, and terminate her employment by the Government. The boat, in fact, remained in the service until July 31, 1863, with or without his consent."

The court further finds, that "no payment was made for the services of the vessel until the 1st of December, 1863, when the defendant's quartermaster stated an account, which was paid and receipted as follows:

The United States to Thomas Clyde,	Dr.
July 31, 1863.—For services of the steamer "Tallacca," employed transporting troops and supplies, from March 1 to July 31, 1863, inclusive, 153 days, at $75 per day...	$11,475 00
Deducting for six days lost in making repairs, as per report of Col. D. H. Rucker, from March 31 to April 6, 1863.....	450 00
	11,025 00
Deduct for two days lost in June, 1863.....	150 00
	10,875 00
Deducting excess of $40 per day, already paid in former settlements, from November 16, 1862, her date of charter, to February 28, 1863, as per letter of instructions, dated Quartermaster General's Office, May 13, 1863	4,200 00
	6,675 00

"I certify that the above account is correct, that the services were rendered as stated, and that they were necessary for the public service.

(Signed) "C. B. FERGUSON,

"*Capt. A. Q. M. U. S. A.*"

"Received, at Alexandria, Virginia, the first day of December, 1863, of Captain C. B. Ferguson, assistant

quartermaster United States Army, the sum of six thousand six hundred and seventy-five dollars, in full of the above account.

(Signed in triplicate.)

(Signed) "THOM. CLYDE."

Upon these facts the Court of Claims decided—

"I. That the Quartermaster General had no arbitrary power to reduce the rate of compensation fixed by the charter-party as to the period already passed when the reduction was ordered, and that the claimant should recover at the charter-rate until knowledge of the Quartermaster General's reduction was brought home to him by the defendants, to wit., until the 31st of May, 1863.

"II. That on, the defendants bringing knowledge of the Quartermaster General's order home to the claimant, the burden of proof rests on him to show that he sought to take the vessel out of the service; and, he failing to make such proof, the presumption of law is, that he voluntarily left her in the service, subject to the future restrictions of the order, and that he should not recover for the period subsequent to the 31st of May, when he received notice."

"And the court further finds, as a matter of fact, under the second count of the claimant's petition." (In regard to the "William E. Hunt.")

"I The claim or cause of action therein set forth was never presented for payment to any executive department of the Government.

"II. The rules of practice of the Court of Claims provide 'that the petition must set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had, specifying also what person or persons are owners thereof, or interested therein, and when and upon what consideration such person or persons became so interested. In every case where the claim is such as is ordinarily settled in any executive department, the petition shall show that application for its allowance has been made to that department, and without success, and its decision thereon.'"

And upon these facts the court, as a conclusion of law, decides—

"That the Court of Claims has jurisdiction of a claim arising upon express contract for the charter of a vessel in the military service of the defendants, notwithstanding that it has never been presented to any executive department for payment, and has never been allowed or rejected by the accounting officers of the Government.

"II. That under the rules of practice which the Court of Claims is by law authorized to adopt, and in contemplation of the statutes relative to the court, the defendants are entitled to have every claim which may be settled and paid by an executive department referred to such department for adjustment before being brought to trial in the Court of Claims, and that the defendants, having taken such objection here, the petition should be dismissed."

Both parties appeal.

Counsel for the United States contends that the court below erred, in not deciding that the payment received, and receipt given, by Clyde on the 1st of December, 1863, was a final settlement of the account between the Government and him, and, therefore, a bar to any further claim upon the Government.

ARGUMENT.

I.

In May, 1863, the Quartermaster General disapproved of the charter of the "Tellacca." What his reason for doing so was does not appear, but it must be presumed that he had reasons which, whether they were sufficient or not, were deemed sufficient by him to justify his action. From that moment the claim of Clyde upon the Government, under the charter-party, must be regarded as a claim disputed by the Government, and the subsequent settlement in December, in accordance with an account in which he was credited with the use of the steamer, at the rate fixed by the Quartermaster General, and charged with the excess which had been paid to him previous to the end of February, and then received the amount thus found due, and gave a receipt in full, was a final satisfaction between the Government and himself.

United States *vs.* Adams, 7 Wallace, 463, 479, 481, and 9 Wallace, 554, 560.

United States *vs.* Child, decided at the present term.

II.

A fortiori must this be so of a settlement for any subsequent use of the steamer by the War Department.

The fact that the claimant did not file his petition for the services of his vessel under this charter-party for nearly five years from the time that he received the payment in accordance with the direction of the Quartermaster General, would seem to indicate that at the time of the settlement he acquiesced in it.

III.

The decision of the court that the claim for the services of the "William E. Hunt" was prematurely brought, under their rules, because it had not been submitted to the proper department, was strictly correct. The rule is an eminently proper one, and one which the Court of Claims was authorized to adopt, and the decision of that court that the rule has not been complied with, and that, therefore, the suit will not be entertained by it, is not one that this court will revise.

A. T. AKERMAN.
Attorney General.
C. H. HILL,
Assistant Attorney General.